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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Pioneer's Preference	)	ET Docket No. 93-266
	)	

COMMENTS OF HENRY GELLER

Henry Geller files these brief comments in response to the Commission's Notice of Proposed Rule Making, released on October 21, 1993. The main thrust of these comments is that the pioneer's preference should be eliminated in the new environment of competitive bidding (auctions).

As the Commission knows, I was an enthusiastic supporter of the preference and its initial proponent. At the time the Commission had soundly abandoned the comparative process in non-broadcast area such as cellular but unfortunately was using an equally stultifying method, the lottery. It made great sense to adopt a pioneer's preference approach so that a party contemplating the expenditure of time and resources to research and develop some innovative use of the radio spectrum would not receive the message, "Wonderful -- tell us (and all your potential competitors) about the innovation in your request for spectrum allocation, and if your request is granted, you can get in line and hope to win the lottery which will attract horde of applicants since it's the equivalent of the 'Irish Sweepstakes'." In these circumstances, the notion of the pioneer's preference was that the innovator would receive some substantial reward and thus would have the incentive to enter

the spectrum R&D area.

With competitive bidding the FCC for the first time is employing a sensible approach to the authorization of scarce spectrum (i.e., frequencies that involve mutually exclusive applications). Not only does the auction get the permit to the party that most values it but it does so without the significant delays and transactional costs involved in the lottery process. Further, properly structured as the FCC has proposed in its Notice in PP Docket No. 93-253, the auction does much to resolve difficult problems such as whether to have nationwide licensing or other combinational approaches within the MTA. There is now no need for the pioneer's preference approach and indeed it can interfere with the efficacy of the auction process, if it results in substantial set asides in important segments of the spectrum being auctioned.

Perhaps an analogy can best point up the desirability of eliminating the preference in the new environment. Suppose a party expended great sums of money and time to effect a technological breakthrough in ocean oil drilling. That effort might well be rewarded with a patent. But certainly the Government would not set aside some portion of a tract in the Continental Shelf being auctioned, in order to provide an incentive for R&D in drilling. Sufficient incentive exists, not only in the patent area but in the innovator being rewarded by venture capitalists who will back the innovation and bid more for the tract because it is more valuable to them. The same analysis should apply to this area.

There is a further policy consideration that is most pertinent

here, and upon which the Commission should focus. At the time of adoption of the pioneer's preference and indeed for over a decade, I have urged a spectrum allocation approach that would markedly serve the public interest -- namely, to the greatest extent possible, affording users increased flexibility and choices in employing their assigned spectrum (subject to "rules of the road" to prevent interference).[1] The present block allocation system is far too rigid. Indeed, it is reminiscent of Gosplan, the old Soviet Union's fatal approach to market matters. A government agency decides what and how much spectrum should be devoted to some particular purpose, and, while in theory that decision can be changed, in reality it is extraordinarily difficult to alter that decision (as shown by the 2 GHz reallocation in the PCS area). This is a most dynamic field. There is simply no way that such governmental decisions can withstand the test of time. The clear solution is to afford flexibility such as was done in the cellular bands, with brilliant success. The Commission, keeping in mind the Fleet Call (now Nextel) episode, should consider what might have happened if there had been flexibility in the 2 GHz bands instead of the rigid requirement of use for, say, fixed microwave.

Of course this change to flexibility must be an evolutionary one and will not extend to all services now using the spectrum.

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[1] See U.S. Spectrum Management Policy: Agenda for the Future, NTIA, February 1991, Chapter 3, for a full discussion of introducing such flexibility, including "increased flexibility in technical standards, and increased choices for users in employing their assigned spectrum" (at 1).

But it can be made applicable, over time, to very large areas of spectrum assignment, with great benefits to the public interest. It could even be extended to the broadcast area. In the last decade, this was proposed and strongly resisted by the broadcasters. It is quite possible that the recent technological and market trends have made an impression upon them so that they might support, rather than oppose, such flexibility.

I cannot emphasize too strongly the need for the Commission to promptly initiate proceedings to afford additional spectrum flexibility. As the Commission well knows, there is a convergence between communications and computing. In both fields, patents are of course available but the innovation, while of great value, may not warrant patentability. In the computer field, the innovator can seek financial backing and proceed to introduce the new approach without seeking any governmental permission. In the communications field, the innovator all too often must petition the agency for some revision of the rules (and in the course of doing so, reveal the innovation prematurely to rivals). Clearly affording the above described flexibility to the maximum extent feasible is the solution. Indeed, it will spur innovation much more than the pioneer's preference since latter still involves the obtaining of a governmental decision while flexibility permits the market to function most effectively.

The foregoing discussion deals with the important general issues in the spectrum allocation and authorization area. There remains the issues posed in pars. 19 and 20 of the Notice. In

light of the above position urging repeal of the preference, I agree with the proposal in par.20 not to go further with the preference process as to the approximately twelve requests that have not received any consideration, even of a tentative nature.

That leaves the four tentative grants referred in par. 19. I of course express no view on the merits of such grants, but rather focus solely on the narrow procedural issue of whether the Commission should continue the process as to these applicants. First, as the legislative history makes clear, this is matter within the agency's discretion. Congress made clear that the Commission can still continue to afford the preference or can decide not to go forward with the preference process. Second, the number is so small (three in the 2 GHz area) that it will not significantly affect the efficacy of the auction process. Finally, in light of the preference set aside already mandated by the legislation, there is an obvious way to award the preference -- namely, in the 20 MHz Block C.

It may be argued that this detracts from the preferences specified by Congress (for small business, rural, minority, and women's applicants). But there are 492 opportunities and this approach would withdraw only three, leaving 489.[2] Surely that

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[2] That large number is also the answer to the argument that the Congressionally mandated preferences simply give the designated groups the opportunity to bid in the set-aside frequency ranges whereas the pioneer's preference actually bestows the permit without the need for any bidding process. That fact, however, is inherent in the nature of the pioneer's preference, and can be accommodated with only very slight impact on the Congressionally mandated preferences (i.e., in three areas only out of 492).

would not significantly undermine the Congressional direction, and would most appropriately accommodate another preference area where the applicants do have significant claims as a matter of equity, namely, that they relied on the government's rules, played by those rules at considerable expense to themselves, and that therefore, the government, if it can do so without significantly undermining its overall goals and purposes, should adhere to the rules in their cases. In light of the above analysis, I believe that the Commission can and should award the above described preference in the three 2 GHz broadband PCS proceeding and the one in the 28 GHz LMDS service.

CONCLUSION

For the foregoing reasons, the Commission should eliminate the pioneer's preference, and most important, open an inquiry as to the portions of the spectrum where it is appropriate to afford greater technical and user flexibility. It should handle the pending pioner's preference requests along the lines suggested above.

Respectfully submitted,

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